



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Re. Appellant: John Musacchia, Jr.  
Serial No.: 09/174,868  
Filed: October 19, 1998  
For: ELEVATED GAME CALL WITH ATTACHMENT FEATURE  
Examiner: U. Cegielnik  
Group: 3712  
Attorney: Gerald E. Helget  
Attorney Docket No.: 33057.1  
Additional Fees: Charge to Deposit Account 02-3732

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BOX AF  
Assistant Commissioner for Patents  
Washington, D.C. 20231

Sir:

**APPLICANT'S APPEAL BRIEF**

Applicant by his attorney submits three copies of this Appeal Brief, pursuant to the Office Action mailed September 24, 2002 and 37 C.F.R. § 1.192 in further of the Appeal, the notice of which was filed with the United States Patent and Trademark Office on January 24, 2003.

**CERTIFICATE OF MAILING**

I hereby certify that this document is being deposited with the United States Postal Service as First Class Mail, in an envelope addressed to: BOX AF Assistant Commissioner for Patents, Washington, D.C. 20231 on the date indicated below.

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By Philip R. Cayan  
Date 3/17/03



### I. REAL PARTY IN INTEREST

The real party in interest is Muzzy Products Corporation having a principal place of business at 110 Beasley Road, Cartersville, Georgia 30120. Muzzy Products Corporation is the current owner of the subject matter of U.S. Patent Application Serial No. 09/174,868 by an assignment from the inventor of the invention, John Musacchia, Jr., dated August 28, 1998 and recorded with the U.S. Patent and Trademark Office on Reel No. 9540 at Frame No. 0739.

### II. RELATED APPEALS AND INTERFERENCES

This application was the subject of a Notice of Appeal filed January 7, 2002. An appeal brief was filed on March 8, 2002. On May 20, 2002, the Examiner mailed an Office Action withdrawing the finality of an earlier Office Action. Applicant responded with an Amendment and Response filed August 19, 2002.

### III. STATUS OF CLAIMS

The claims on appeal are claims 1 and 3-18. Claims 1 to 9 were originally filed in the present application. Claims 1 and 9 were amended in a Response dated February 2, 2000 to an Office Action mailed August 2, 1999. Claim 1 was again amended in a Response dated May 21, 2000 to an Office Action mailed March 2, 2000. Claim 2 was canceled and the limitations of claim 2 were incorporated into claim 1, claims 3 to 9 were amended and new claims 10 to 13 were added in a Preliminary Amendment in association with a Continued Prosecution Application filed January 31, 2000. Claims 1, 3 to 7, and 10 were amended and new claims 14 to 18 were added in a Response dated July 3, 2001 to an Office Action mailed April 3, 2001. In the Final Office Action mailed September 5, 2001, Claims 6 to 9 and 14 to 18 were allowed, claims 12 and 13 were objected to and deemed allowable if rewritten as independent claims incorporating all the limitations of claim 10, and claims 1, 3 to 5, 10 and 11 were finally rejected. In the Office Action mailed May 20, 2002, the Examiner withdrew the finality of the Office Action and rejected claims 1 and 3-18 on different grounds. Applicant filed a response on August 19, 2002 without amending the claims, and claims 1 and 3-18 stand finally rejected.

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#### **IV. STATUS OF AMENDMENTS**

No amendments have been made after the final rejection dated September 24, 2002.

#### **V. SUMMARY OF THE INVENTION**

The present invention provides a game call that can be releasably secured around a hunter's thigh and used to call game using only one hand. Prior to the present invention, game calls typically required the use of two hands to emulate the calls of game. Therefore, a hunter would have to either put the call down or shift the call within the hunter's hand to properly aim and fire his gun. This exchange of game call for gun can frequently cause unwanted noise scaring the game before the hunter can get a shot off. The present invention generally includes a sound emanating surface that is elevated from the hunter's thigh by a leg or elevating device of a body attachment assembly. Thus, the sound produced by the present game call can escape to ambient.

As recited by the claims, the invention provides a one-piece game call (10) and elevating device or legs (14, 16), and a body attachment assembly (76). Game call (10) including a sound emanating surface (30) including apertures (70) for the escape of sounds created by game call (10). Elevating device or legs (14, 16) elevate sound emanating surface (30) from the leg or other surface of the hunter on which the invention is resting to provide an unencumbered path for the sound to escape game call (10) and reach ambient.

#### **VI. ISSUES**

1.) Whether or not claims 1 and 3-18 are non-obvious under 35 U.S.C. § 103(a) over U.S. Patent No. 5,067,091 (Mussachia).

#### **VII. GROUPING OF CLAIMS**

The rejected claims stand or fall together.

#### **VIII. ARGUMENT**

I. Claims 1 and 3-18 are non-obvious under 35 U.S.C. § 103(a) over U.S. Patent No. 5,067,091 (Mussachia).

Specifically, the Office Action states:

Musacchia discloses the claimed invention except for the game call device constructed as one piece as recited in claims 1, 10, 14, and 17. It would have been obvious to one having ordinary skill in the art at the time the invention was made to form the game call device as one piece, since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art.

Applicant respectfully disagrees.

The Examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness.<sup>1</sup> If the Examiner does not produce a *prima facie* case, the applicant is under no obligation to submit evidence of non-obviousness.<sup>2</sup>

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure.<sup>3</sup>

The fact that a prior art device could be modified to produce the claimed invention is not a basis for an obviousness rejection unless the prior art suggested the desirability of such a modification.<sup>4</sup> Both the suggestion and the expectation of the success must be founded in the prior art, not in the applicant's disclosure.<sup>5</sup> When obviousness is based on a single reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference.<sup>6</sup>

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<sup>1</sup>MPEP Sec. 2142.

<sup>2</sup> Id.

<sup>3</sup>Id. (emphasis supplied)

<sup>4</sup> *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984)

<sup>5</sup> *In re Dow Chemical Co.*, 837 F.2d 469 (Fed. Cir. 1988)

<sup>6</sup> *In re Kotzab*, 208 F.3d 1352 (Fed. Cir. 2000)

There is no suggestion to combine if a reference teaches away from its combination with another source. A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be led in a direction divergent from the path that was taken by the applicant.<sup>7</sup>

Applicant respectfully traverses the § 103 rejection because the office action has not established a *prima facie* case of obviousness.

Musacchia does not disclose a suggestion or motivation within the four corners of the reference to make the combination. Furthermore, Musacchia teaches away from such a combination because the device of Musacchia is expressly disclosed as being constructed without an integrated game call so as to allow various types of game calls to be disposed so that maximum resonance is achieved. Abstract, Field of the Invention, Summary of the Invention. One of ordinary skill in the art, having Musacchia before him, would not be motivated to combine a game call with an adapter as one-piece because Musacchia teaches away from this.

Applicant pointed out the advantages of Applicant's invention over Musacchia in the Specification at page 3.

The reference does not teach or suggest all the claim limitations.

The claims are therefore allowable.

Furthermore, the Examiner has never given full credit to the arguments that Applicant made earlier in the prosecution in regard to this reference.

Specifically, claims 1-9 were rejected under 35 USC § 103 over Musacchia in the Office Action mailed August 1, 2000 (Paper No. 8). In that Office Action, the Examiner responded to Applicant's arguments and 37 CFR 1.132 Affidavit submitted in the

Amendment and Response filed February 2, 2000 and re-iterated in the Amendment and Response filed May 31, 2000.

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<sup>7</sup> *Tec Air v. Denso Mfg. Michigan, Inc.*, 192 F.3d 1353 (Fed. Cir. 1999)

The Examiner merely stated that applicant had provided little objective evidence for long-felt need.

However, the MPEP states the following:

Examiners must consider comparative data in the specification which is intended to illustrate the claimed invention in reaching a conclusion with regard to the obviousness of the claims. (citations omitted) The lack of objective evidence of nonobviousness does not weigh in favor of obviousness.

MPEP § 716.01(a)

Applicant provided comparative data in the Specification at page 3.

The MPEP also states:

Although factual evidence is preferable to opinion testimony, such testimony is entitled to consideration and some weight so long as the opinion is not on the ultimate legal conclusion at issue. While an opinion as to a legal conclusion is not entitled to any weight, the underlying basis for the opinion may be persuasive. (citations omitted)

MPEP § 716.01(C)

An affidavit of an applicant as to the advantages of his or her claimed invention, while less persuasive than that of a disinterested person, cannot be disregarded for this reason alone.

id.

Thus, the Examiner erred in not taking Applicant's 1.132 Affidavit into account, giving it consideration and some weight, even though it was the Examiner's position that the Affidavit did not have sufficient objective evidence.


In view of the foregoing, Appellant asks the Board to overturn the Examiner's rejections and allow all claims

IX. APPENDIX

The appealed claims are presented in the attached appendix.

Respectfully submitted,

Dated: 3/17/03

By   
Gerald E. Helget (Reg. No. 30,948)  
Nelson R. Capes (Reg. No. 37,106)  
Briggs and Morgan, P.A.  
2400 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
Telephone: (612) 334-8480

## APPENDIX

1. A hunting device for producing sound comprising:

(a) a one-piece game call and elevating device, wherein sound is produced, said game call having a scratch surface separated from a sound emanating surface, the sound emanating surface having apertures through which the sound in said game call escapes the game call; and

(b) a body attachment assembly, connected to said elevating device, designed to releasably attach the game call and elevating device to the body of a user of the hunting device;

the elevating device elevating the sound emanating surface of said game call such that the sound emanating surface is not in contact with a user when the body attachment assembly is attached to the body of a user, thereby providing an unencumbered path for the sound to escape the game call and reach ambient.

3. A hunting device according to Claim 1, wherein said elevating device comprises legs each having a first end and a second end, wherein said first ends of said legs are attached to said game call; and wherein said second ends of said legs are designed to contact the body of a user.

4. A hunting device according to Claim 1, wherein said elevating device comprises:

(a) a platform having a top surface and a bottom surface, said platform supporting said game call; and

(b) legs depending from said platform, each said leg having a first end and a second end, wherein said first end of each said leg is in contact with said platform; and wherein said second end of each said leg is designed to contact the body of a user.

5. A hunting device according to Claim 4, wherein said platform of the hunting device is substantially rectangular and includes front and rear legs extending from said bottom surface of said platform.



6. A hunting device according to Claim 1, wherein said body attachment assembly comprises:

(a) an elongated flexible element having one end connected to said elevating device; and

(b) an opposite free end on said flexible element provided with a hook.

7. A hunting device according to Claim 6, further comprising a receiving formation on said platform and wherein said hook is selectively engagable and disengagable with the receiving formation.

10. A hunting device for a hunter, the hunting device for producing sounds and comprising:

(a) a one-piece game call with legs, the game call having a scratch surface and a sound emanating surface, the sound emanating surface having apertures through which sound in the game call can escape the game call, each leg extending from the sound emanating surface and terminating in a leg end; and

(b) a body attachment assembly designed to releasably secure each leg end to a hunter;

the sound emanating surface designed to be separated a distance from a hunter by the legs when said body attachment assembly is secured to a hunter, each leg end designed for supporting the hunter device on a hunter, and for providing an unencumbered path for the sounds to escape the game call.

14. A hunting device for producing sound comprising:

(a) a one-piece game call and elevating device, wherein sound is produced, said game call having a scratch surface separated from a sound emanating surface, the sound emanating surface having apertures through which the sound in said game call escapes the game call; and

(b) a body attachment assembly connected to said elevating device, designed to releasably attach the game call and elevating device to the body of a user of the hunting device;

said body attachment assembly comprising (i) an elongated flexible element having one end connected to said elevating device; and (ii) an opposite free end on said flexible element provided with a hook;

the elevating device elevating the sound emanating surface of said game call such that the sound emanating surface is not in contact with a user when the body attachment assembly is attached to the body of a user, thereby providing an unencumbered path for the sound to escape the game call and reach ambient.

15. A hunting device according to Claim 14, wherein said elongated flexible element comprises:

- (a) a strap; and
- (b) a buckle on said strap allowing for the adjustment of the length of said strap.

16. A hunting device according to Claim 14, further comprising:

- (a) a flexible tether having opposing ends; and
- (b) a striker;

wherein said opposing ends of said tether are respectively attached to said striker and said platform of the device.

17. A hunting device for a hunter, the hunting device for producing sounds and comprising:

- (a) a one-piece game call with legs, the game call having a scratch surface and a sound emanating surface, the sound emanating surface having apertures through which sound in the game call can escape the game call, each leg extending from the sound emanating surface and terminating in a leg end; and
- (b) a body attachment assembly designed to releasably secure each leg end to a hunter comprising (i) an elongated flexible element having one end connected to the game call; (ii) an opposite free end on the flexible element provided with a hook;

and (iii) a receiving formation on the game call, wherein the hook is selectively engagable and disengagable relative the receiving formation;

the sound emanating surface designed to be separated a distance from a hunter by the legs when said body attachment assembly is secured to a hunter, each leg end designed for supporting the hunting device on a hunter, and for providing an unencumbered path for the sounds to escape the game call.

18. The hunting device according to Claim 17, wherein the elongated flexible element comprises:

- (a) a strap; and
- (b) a buckle on said strap allowing for the adjustment of the length of said strap.